STATE OF MICHIGAN

COURT OF APPEALS

PATRICK D. BRENNAN and BEDELLA M. BRENNAN,

Plaintiffs-Appellees,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY and SUPERVISOR OF WELLS,

Defendants-Appellants.

UNPUBLISHED
September 30, 2003

No. 235196
Court of Claims
LC No. 98-017038-CM

Before: Fitzgerald, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

In this inverse condemnation case, defendants appeal as of right from the trial court's order, after a bench trial, granting plaintiffs damages in the amount of $1,680,981, with post-judgment interest at the rate of 12 percent. We vacate the trial court's order and remand this case to the trial court for dismissal of the claim.

Plaintiffs are owners of a 40-acre tract of land in Jordan Township, Antrim County. Plaintiffs' land was proposed for inclusion in a uniform spacing plan[1] (USP) known as Jordan 35 USP, for production from the Antrim Shale Formation. However, the petitioner[2] for the USP voluntarily removed, pursuant to the Department of Natural Resources' request, the state of Michigan unleased lands that provided contiguity between plaintiffs' land and other proposed USP land. Thus, consistent with the Antrim Shale Formation spacing order, Order No. (A) 14-9-94 ("the spacing order),[3] the Supervisor of Wells (supervisor), in Order No. (A) 14-5-97 ("the USP order"), excluded plaintiffs' land because it did not share one common boundary of approximately 1,320 feet with other lands in the proposed USP. Further, the supervisor declined the petitioner's request to accept plaintiffs' land as an exception to the boundary requirement because no surface access to plaintiffs' land via adjoining parcels meant that plaintiffs' land

[1] A uniform spacing plan is a combination of property into a unit of development for oil or gas production that gives the operator flexibility regarding well location.

[2] The petitioner is O.I.L. Energy Corporation.

[3] The spacing order governs the location and spacing of wells and the development of units or pooled areas in the Antrim Shale Formation in twenty-two Michigan counties.

"cannot be drained by existing or proposed wells." Thereafter, plaintiffs filed the instant action claiming inverse condemnation of their land.

Defendants first argue on appeal that "[t]he trial court lacked subject matter jurisdiction because the action was not ripe due to plaintiffs' failure to obtain finality from [the] MDEQ [Michigan Department of Environmental Quality] prior to seeking judicial resolution of a regulatory taking issue." In other words, defendants contend, in essence, that this case was not properly before the trial court because plaintiffs failed to obtain a final determination from a governmental agency before seeking judicial recourse. We agree.

"[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 150 S Ct 3108; 87 L Ed 2d 126 (1985); *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57; 445 NW2d 61 (1989) (adopting the ruling in *Williamson* that in an action under 42 USC 1983 for damages resulting from an unconstitutional regulatory taking, a decision of an administrative body must be "final" before it is judicially reviewable); *Lake Angelo Assoc v White Lake Twp*, 198 Mich App 65, 69-72; 498 NW2d 1 (1993) (extending the finality requirement to regulatory taking claims, whether framed as a violation of the Just Compensation Clause of the Fifth Amendment or of the Due Process Clause of the Fourteenth Amendment, not just to actions based on 42 USC 1983.). "[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson, supra* at 193. "The purpose of the finality requirement is to ensure that there actually was a taking." *Paragon Properties Co v City of Novi*, 206 Mich App 74, 76-77; 520 NW2d 344 (1994), aff'd 452 Mich 568; 550 NW2d 772 (1996). "Finality is relevant to subject-matter jurisdiction …." *Paragon, supra* at 206 Mich App 77.

In the present case, we find that the action is not ripe for review. The supervisor, in determining whether plaintiffs' land could be part of the proposed USP, applied its previous spacing order. In doing so, the supervisor determined that plaintiffs' land failed to meet the requirement of the spacing order concerning the sharing of one common boundary of approximately 1,320 feet with other lands in the proposed USP. Further, the supervisor declined the petitioner's request to accept plaintiffs' land as an exception to the boundary requirement. Consequently, the supervisor declined to include plaintiffs' land in the USP by excepting it from the boundary requirement. Plaintiffs maintain that their inverse condemnation claim is ripe because their land was excluded from the USP under these circumstances and in light of the fact that the spacing order rules that 40-acre tracts of land cannot be developed because they constitute waste. However, the spacing order expressly provides that "[e]xceptions to the spacing and location requirements of the [o]rder may be granted after notice and hearing." We have found nothing in the record indicating that plaintiffs sought an exception to the application of the supervisor's spacing order with respect to the development of their 40-acre tract of land separate from the USP,[4] and thus there is no finality. In other words, even though plaintiffs' land

[4] Indeed, early on in the action the trial court observed that "[i]t's interesting to note that never have … plaintiffs on their own petitioned the Supervisor of Wells for any determination with respect to its own—or their own parcel."

was excluded from the USP, they still had the option to develop it separate from the USP by petitioning for an exception from the spacing order. Because no application was made, it is not certain that a final, definite position on plaintiffs' land has been made by the supervisor and therefore, plaintiffs' claim is not ripe for judicial review.

Plaintiffs' assert that defendants "have admitted by reason of their default, that the effect of their regulation is to eliminate the value of [p]laintiffs' mineral estate and cause a taking of [p]laintiffs' property." In other words, plaintiffs claim that this action is properly within the judiciary by virtue of defendants' default. However, because there was no finality where plaintiffs failed to pursue an exception to the supervisor's spacing order, plaintiffs' claim is not ripe. Ripeness is relevant to subject matter jurisdiction, and without jurisdiction, the default is void. See *Todd v Dep't of Corrections*, 232 Mich App 623, 628; 591 NW2d 375 (1998) ("When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void."); *Banner v Banner*, 45 Mich App 148, 153; 206 NW2d 234 (1973) ("A judgment entered by a court without subject-matter jurisdiction is a void judgment and may be vacated at any time on the court's own motion or upon the motion of any party thereto ….."). Plaintiffs' action is premature, and thus should have been dismissed.

In light of our disposition with respect to finality, we do not reach the other issues raised on appeal.

Vacated and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell